Supreme Court No. SC92796

IN THE MISSOURI SUPREME COURT

SARAH BADAHMAN,

Respondent,

vs.

CATERING ST. LOUIS, et al.,

Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
THE HONORABLE JULIAN BUSH, CIRCUIT JUDGE
CAUSE NO: 0922-CC09062

COURT OF APPEALS NO. ED97516

SUBSTITUTE BRIEF OF THE APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants initially filed their Notice of Appeal in this Court for the reason that §537.068 R.S.Mo., at least insofar as it provides for additur, is invalid, in that it violates Art. 1, § 22(a), of the Missouri Constitution by invading a litigant's right to trial by jury. This issue has not previously been addressed by the Supreme Court. *See e.g.*, ***Tucci v. Moore***, 875 S.W.2d 115, 116 (Mo. banc 1994) (wherein the Court noted that although the constitutionality of additur was raised, the Court did not reach that issue).

After suggestions in favor and against jurisdiction in this Court were filed by the parties, this Court ordered the case be transferred to the Missouri Court of Appeals, Eastern District, stating that jurisdiction of the case was vested in the Court of Appeals pursuant to Missouri Constitution, Art. V, § 11.

The Court of Appeals, in an Opinion authored by Gary M. Gaertner, Jr., C.J. held that the jury's award of $11,250 in actual damages was supported by substantial evidence and conformed to the damage instruction given by the trial court, so that the trial court abused its discretion in granting additur. ***Badahman v. Catering St. Louis, et al.*** – S.W.3d – (2012), 2012 WL 2899554.

This Court granted transfer in response to a Motion for Transfer filed by Respondent, in which she argued that the Court of Appeals applied the wrong standard of review in reversing the trial court's additur order. Specifically, the Court of Appeals had reviewed the additur order in the light most favorable to the jury's verdict, and Respondent

argues that the trial court's order should be reviewed in the light most favorable to the additur order.

STATEMENT OF FACTS

Sarah Badahman, ("Respondent" or "Badahman") brought this lawsuit against her former employer, Catering St. Louis, Inc. ("CSL") and its president, Mark Erker ("Erker" or sometimes collectively referred to as "Appellants"), claiming that she had been terminated from her position with CSL due to a disability, in violation of the Missouri Human Rights Act. L.F. 14. Badahman's claim was tried to a jury before the Honorable Julian Bush, in Division 4 of the St. Louis City Circuit Court, from April 26 through April 29, 2011. L.F. 4-6.

CSL operates four (4) restaurants, the Boathouse in Forest Park, Perk Café at the Forest Park Visitor's Center, Sassafras Café at the Missouri Botanical garden, and the Whittemore House (a/k/a the Faculty Club) at Washington University. TR 199. At all times relevant hereto it also provided catering services at a number of locations for which it has exclusive rights or at which it is one of a limited number of catering companies allowed to offer catering at the venue. The venues at which CSL had exclusive catering privileges included the Missouri Botanical Garden, the Artists' Guild in Oak Knoll Park in Clayton, Oliva in St. Louis' Hill neighborhood, the Boathouse, and Whittemore House. It has the non-exclusive right to offer catering services at locations including the Jewel Box and Worlds Fair Pavilion in Forest Park, the Arch, City Museum and City Garden in downtown St. Louis, the Donald Danforth Plant Science Center in Olivette, and the Foundry Arts Center in St. Charles. CSL also caters events at residences, corporate, and other private locations scattered about the St. Louis area. For example, while Badahman was employed

by CSL, it catered events at Hunters Farm, located at 141 and Ladue Roads, and an event for Taub Tent Company in Columbia, Illinois. TR 200, 253-54, 360-62.

Badahman was hired by CSL after applying for a job posting she found on Craigslist for a recruiter position. TR 45-46. When she interviewed with Erker, she understood that she was expected to both help retain current CSL employees by developing relationships with them and to go out into the community and recruit new employees. TR 51. Outside recruitment included attending job fairs and going to local colleges, churches, and other places to get recruiting leads. TR 105-06. Erker and Badahman also discussed the fact that as part of her job she would be required to visit the CSL restaurants and other facilities operated by CSL, and events catered by CSL, at various locations around St. Louis. TR 104-05. They also discussed that she had reliable transportation. TR 52. Badahman agreed at trial that "reliable transportation was an essential function" of her job. TR 166.

Badahman was hired with the "recruiter and retention" title and began work on March 17, 2008. TR 55-56. Her annual salary was $45,000. TR 55. On the employment application, Badahman stated that she had "reliable transportation to get to and from work promptly at any time during the day or night." TR 57. CSL's main office was located on 59th Street, about two miles from Forest Park. TR 57. During the interview process, she was told that she would be expected to work about 55 hours per week, including on nights and weekends. TR 107.

As part of her job, Badahman conducted group orientations of the new employees, primarily at the Boathouse restaurant in Forest Park, with others at CSL's main office. TR 60. She also met with new restaurant employees on their first day of work at the

location of their job, called "on-boarding", which was her idea. TR 60-61, 120. The new employees would be on-boarded prior to the beginning of their shift, which varied based on the restaurant where they worked and whether they worked in the kitchen or the "front of the house." TR 62-64, 122. Badahman drove herself to these various locations. TR 64, 121. She traveled frequently for on-boardings when she worked at CSL, sometimes several times a day, and generally at least several days a week. TR 114. See also, Trial Exhibit P. For instance, if new employees were starting at three different venues on the same day, she made sure that she went to each of those venues on the same day. TR 116. She also was required to go to the central office on those days. TR 124. She was also expected to call on college placement officers and people at churches. TR 124-25.

As the number of on-boardings decreased, CSL and Erker advised Badahman that she was expected to attend more catering events, which usually occurred on the weekends, and required her to have transportation. TR 129-130.

On July 14, 2008, Badahman told CSL's human resources manager, Joan Vosholler ("Vosholler"), that she had epilepsy and that her neurologist was suspending her drivers' license. TR 70. She told Vosholler that it was possible that her license would be suspended at least 6 months because she was required to be seizure-free for six months before she could get a doctor to fill out the DMV form allowing her to have her license reinstated. TR 73, 80. Until Badahman lost her license, she drove herself everywhere she went for CSL. TR 153.

On August 1, 2008, Erker, Vosholler, and Badahman met to discuss the loss of Badahman's driver's license. TR 80. Erker followed an "interactive dialogue" script

prepared by his attorney, Ruth Binger. TR 335-36, 386. After confirming Badahman had lost her license for at least 6 months, Erker told her that he had considered whether she would be able to perform her job without driving, and had thought about, and rejected, several potential alternative methods of transportation, including buses, taxis, and hiring a driver, as being inadequate and inefficient to get her where she needed to go when she needed to be there. He then asked Badahman whether she had any proposals for alternative transportation which would work. TR 386-87. She suggested taxi cabs, the Metro and getting rides from co-workers. TR 81, 157. Erker did not believe these were acceptable, and ultimately terminated Badahman. TR 82, 387-89.

In her MCHR charge, Badahman stated that after losing her license, she was able to perform the essential functions of her job by taking public transportation, taxi-cabs and by getting a ride in the vans which CSL routinely sent to catering and restaurant sites. Trial Exhibit M. In paragraph 18 of her Petition, Badahman stated that after losing her license she was able to continue to perform her job by riding in vans CSL routinely sent to catering and restaurant sites, utilizing public transportation or by having friends or relatives drive her to work. L.F. 17.

During the two weeks prior to her termination, while she was unable to drive herself, Badahman was able, on one occasion, to catch a ride on the catering van from the Boathouse to CSL's office. TR 147-148. However, this had not been planned, the van just happened to be at the Boathouse when she needed a ride. TR 148-149. Further, the vans did not routinely go to the restaurants. TR 155. The vans were primarily used to transport food, dishes and other supplies from the central office to catered events, and generally both

seats in the van would be occupied by the chef and a helper. TR 149, 155. Although she suggested to Erker that she could use public transportation to get to job locations, during the two weeks between when Badahman's driving privileges were suspended and when her employment with CSL was terminated, she only took the Metro train between her home and the De Balliviere stop, but not to any job sites. TR 148, 174. She also never took a bus during those two weeks. TR 148. Badahman never took taxi cabs between job locations either. TR 151. Nor did she ever have a friend or relative drive her between CSL venues. TR 155. While she did arrange several times to get rides from co-workers in advance, there were also several times where she caught rides with co-workers that she had not planned. TR 157-158. After Badahman lost her license, she did not do any on-boarding at Perk Cafe, Sassafras or Whittemore House (there were none during the two weeks between when she lost her license and when her employment was terminated), and she did not go to any catered events, or make any recruiting visits anywhere. TR 178-179. Other than the on-boarding at the Boathouse, she worked from the central office. TR 180.

Badahman received a weeks' severance pay when she was terminated on Friday, August 1, 2008. TR 85. She further testified that she immediately began looking for a new job the Monday after she was fired. TR 85. She contacted her former employer, Kelly Services, which verbally released her from her noncompete agreement and told her about a job at Manpower, for which she applied. TR 85. Manpower rejected her because of the non-compete, but Badahman made no attempt to obtain a written release from Kelly Services. TR 179-180. When asked whether the position at Manpower paid more than $40,000.00 per year, Badahman answered "I don't recall." TR 181.

Ultimately, Badahman secured a job at Gateway Healthcare in October 2008; she was unemployed for approximately two to three months. TR 86. At Gateway Healthcare she earned an annual salary of $27,000, but only worked there about eight months. TR 87. She left that position and went to work as an office manager for a physician, who shared an office with her brother-in-law at an annual salary of $33,000. TR 87-88.

Badahman's attorneys' office prepared a spreadsheet based upon Badahman's tax forms and a pay stub, and giving credit to CSL for the severance payment, her total claimed lost wages were $44,979.72. TR 92-93. Badahman also asked the jury to compensate her for the emotional harm she claimed she suffered as a result of her termination. TR 93.

During closing argument Badahman's attorney stated, "Again, the amount is up to you, but I'm going to suggest that you fully compensate Ms. Badahman for her lost wages in the amount of $44,979, that you award her an additional $150,000 to compensate her for the emotional distress that she has suffered." TR 447-448. The damage instruction (submitted by Badahman) instructed the jury to "award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the occurrence mentioned in the evidence." Appendix A15.

The jury returned a verdict against CSL and Erker in the amount of $11,250.00 in actual damages. L.F. 87. This amount is precisely equal to three months' salary at the rate that Badahman was paid during her employment with CSL (i.e., annual salary: $45,000/12 months =$3,750 x 3 months = $11,250). This comports with the evidence that Badahman was out of work for approximately two to three months after being terminated by CSL. TR 86.

Further, the jury found that Erker was not liable for punitive damages, but that CSL was liable for punitive damages and, in a bifurcated proceeding, awarded $2,000.00 in punitive damages against CSL. L.F. 87-88.

Thereafter, on May 4, 2011, and prior to the entry of Judgment by the trial court on the jury's verdict, Badahman filed a Motion for Additur or in the Alternative for New Trial on the Issue of Damages ("Additur Motion"). L.F. 89.

The trial court entered Judgment on the Jury Verdict on May 12, 2011. L.F. 106. On the same date, Appellants filed their Memorandum in Opposition to the Additur Motion, in which they argued, among other grounds for the trial court to deny the motion, that the jury verdict was supported by substantial evidence and that §537.068 R.S.Mo., insofar as it provides for additur, violates Art. I, §22(a) of the Missouri Constitution, which provides in relevant part, "That the right of trial by jury as heretofore enjoyed shall remain inviolate." L.F. 97.

On June 2, 2011, Appellants filed a Supplemental Memorandum of Law with the trial court, again asserting that the jury verdict was supported by substantial evidence and that §537.068 R.S.Mo. violates Art. I, §22(a) of the Missouri Constitution. L.F. 107.

Also on June 2, the trial court issued its Order granting Additur, or in the alternative, if Additur was rejected by one or more of the parties, granting Badahman a new trial as to damages only. L.F. 114. In its Order, the trial court stated that,

> [t]hough the evidence for liability was far from overwhelming, the evidence that Ms. Badahman suffered lost wages of $44,979.12 was quite strong. Indeed it was uncontradicted. The jury's award of $11,250 then is

inadequate because it is less than fair and reasonable compensation. It is surely against the weight of the evidence.

L.F. 115. While this Order originally stated that the parties had 14 days to elect a new trial, it was later amended (pursuant to Rule 78.10) to give the parties 30 days to decide whether to elect a new trial. L.F. 116. On or about June 30, 2011, CSL and Erker filed a Memorandum with the Court rejecting Additur and electing a new trial. L.F. 118.

On or about July 19, 2011, the trial court issued its order setting aside the Judgment entered on May 12, 2011, and ordering a new trial on the issue of damages only. L.F. 117. By Order of September 7, 2011, the trial court Order of July 19, 2011, was corrected to denominate that document as a "judgment and order", rather than as simply an "order." L.F. 128.

On or about June 10, 2011, Badahman filed a Motion to Amend Judgment to include attorneys' fees under the Missouri Human Rights Act. L.F. 2-3. On or about August 5, 2011, Badahman filed a Memorandum withdrawing this Motion. L.F. 2. This was the last authorized post-trial motion pending before the trial court.

The appeal in the Court of Appeals, as described in the Jurisdictional Statement, followed. L.F. 120.

POINTS RELIED UPON

I. **THE TRIAL COURT ERRED IN GRANTING BADAHMAN'S MOTION FOR ADDITUR BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE JURY'S AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, THE EVIDENCE SUPPORTS THE AWARD OF $11,250 IN ACTUAL DAMAGES.**

Wiley v. Homfeld, 307 S.W.3d 145 (Mo.App. W.D.2009)

Massman Const. Co. v. Missouri Highway & Transp. Comm'n, 914 S.W.2d 801, 803 (Mo. banc 1996)

Root v. Manley, 91 S.W.3d 144, 146 (Mo.App. E.D. 2002)

Crawford ex rel. Crawford v. Shop 'N Save Warehouse Foods, Inc., 91 S.W.3d 646 (Mo.App. E.D. 2002)

Missouri Supreme Court Rule 78.10

II. **THE TRIAL COURT ERRED IN GRANTING BADAHMAN'S MOTION FOR ADDITUR BECAUSE §537.068 RSMO, AND MO.S.CT. RULE 78.10, TO THE EXTENT THAT THEY PERMIT ADDITUR, ARE AN UNCONSTITUTIONAL INVASION OF A LITIGANTS' RIGHT TO TRIAL BY JURY AS GUARANTEED BY ARTICLE I, §22(a) OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE AND RULE ALLOW THE TRIAL JUDGE TO SUBSTITUTE HIS JUDGMENT FOR THAT OF THE JURY AS TO THE PROPER AMOUNT OF DAMAGES, AND IN THAT**

ADDITUR, UNLIKE REMITTITUR, WAS NOT RECOGNIZED BY THE COMMON LAW AT THE TIME THE MISSOURI CONSTITUTIONAL PROVISION PROTECTING THE RIGHT TO A JURY TRIAL WAS ADOPTED.

Dimick v. Schiedt, 293 U.S. 474 (1935)

Firestone v Crown Center Redevelopment Corp, 693 S.W.2d 99 (Mo. banc 1985)

Burdict v. Missouri Pacific Railway Co., 27 S.W. 453 (Mo. 1894)

State ex rel. Diehl v O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

Missouri Constitution Art. I, §22(a)

§537.068 R.S.Mo.

III. **THE TRIAL COURT ERRED IN ENTERING AN ORDER GRANTING A NEW TRIAL ON DAMAGES ONLY BECAUSE EVEN IF IT IS NOT UNCONSTITUTIONAL FOR A TRIAL COURT TO GRANT ADDITUR, THE PORTION OF MISSOURI SUPREME COURT RULE 78.10 WHICH PERMITS A COURT TO GRANT A NEW TRIAL AS TO DAMAGES ONLY WHEN A PARTY REJECTS ADDITUR IS AN UNCONSTITUTIONAL INVASION OF A LITIGANT'S RIGHT TO TRIAL BY JURY, IN THAT IT ALLOWS THE JUDGE TO ESSENTIALLY DECIDE THE ISSUE OF LIABILITY.**

Williams By and Through Wilford v. Barnes Hosp., 736 S.W.2d, 33 (Mo. 1987)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo. banc 2010)

Missouri Constitution Art. I, §22(a)

Missouri Supreme Court Rule 78.10

IV. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY IN THAT THE ISSUES OF LIABILITY AND DAMAGES ARE SO INTERTWINED THAT ANY NEW TRIAL SHOULD BE AS TO BOTH DAMAGES AND LIABILITY.

Massman Const. Co. v. Missouri Highway & Transp. Comm'n., 948 S.W.2d 631 (Mo.App.W.D. 1997)

Zibung v. Union Pacific R. Co, 776 S.W.2d 4 (Mo. banc s1989)

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989)

Missouri Supreme Court Rule 78.10

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING BADAHMAN'S MOTION FOR ADDITUR BECAUSE THETRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE JURY'S AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, THE EVIDENCE SUPPORTS THE AWARD OF $11,250 IN ACTUAL DAMAGES.

A. Standard of Review

Courts will review the doctrine of additur as though it encompasses the same principles as remittitur, particularly in light of the paucity of cases discussing additur. ***Knox v. Simmons,*** 838 S.W.2d 21, 23 (Mo.App. E.D.1992). Because the "doctrine of additur is a corollary of remittitur, and encompasses the same principles," Missouri courts analyze additur and remittitur the same way. ***Norris v. Barnes***, 957 S.W.2d 524, 528 n.3 (Mo.App.W.D. 1997).

An appellate court will not disturb a trial court's order of additur or remittitur except upon a finding that the trial court abused its discretion. ***Bishop v. Cummines***, 870 S.W.2d 922, 923 (Mo.App.W.D. 1994). In determining whether a trial court has abused its discretion by granting remittitur or additur, an appellate court is "to view the evidence in the light most favorable to the verdict." ***Wiley v. Homfeld,*** 307 S.W.3d 145, 148 (Mo.App.

banc W.D. 2009), at 148.[1] A trial court abuses its discretion if it grants additur or remittitur in a case where the jury verdict is supported by the evidence when viewed in such light. ***Id.*** at 145.

In Respondent's Application for Transfer to this Court, she claims that this is the wrong standard of review, and that, in determining whether to uphold an order of additur, this Court should view the evidence in the light most favorable to the trial court's order.[2] However, the standard of review as enunciated in ***Wiley*** is supported by this Court's decision in ***Firestone v. Crown Center Redevelopment Corp.***, 693 S.W.2d 99 (Mo.banc 1985), which is its most recent pronouncement as to the standard of review to be applied where a trial court has granted additur or remittitur.

The cases which Respondent relies in arguing for a contrary standard of review were overruled *sub-silentio* in ***Firestone.*** See ***Wiley v. Homfeld***, 307 S.W.3d 145, 149 (Mo.App.W.D. 2009), wherein the Court found that ***Firestone*** rejected the decision in ***Steuernagel v. St. Louis Public Serv. Co.***, 238 S.W.2d 426 (Mo. 1951) and other prior

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[1] This Court refused transfer in ***Wiley.***

[2] Interestingly, Respondent apparently concedes that an order denying remittitur or additur should be reviewed in the light most favorable to the jury verdict.

cases of this Court, which had held that a trial court's remittitur order was to be reviewed in a light most favorable to the trial court's order.[3]

In ***Firestone***, the trial court ordered a remittitur. This Court noted that it was for the jury to evaluate the credibility of conflicting evidence and that the jury is vested with "broad discretion in fixing fair and reasonable compensation to an inured party (citation omitted)" and that the "evidence of plaintiff's injuries substantiates the jury's award to her in this case. Such a record does not authorize a trial court in the exercise of reasonable discretion to order any portion of it remitted, and the jury's verdict must be restored." ***Id.*** at 109-110. In reaching this conclusion, the Court cited ***Dodd v. Missouri-Kansas-Texas R. Co.***, 193 S.W.2d 905, 907 (Mo. 1946). This Court then restored the jury's verdict. ***Firestone*** at 110.

In ***Dodd***, this Court held, in an appeal from an order of new trial entered after plaintiff refused to accept remittitur, that: "In considering the question of whether a verdict is excessive a court must take into consideration the plaintiff's evidence in its most

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[3] The dissent in ***Wiley*** cited extensively from ***Steuernagel***, and cited ***Morris v. Israel Brothers, Inc.***, 510 S.W.2d 437 (Mo. 1974) and ***Combs v. Combs***, 295 S.W.2d 78 (Mo. 1956), which are cases that Respondent claims support her argument that the Court should review the trial court's additur order in the light most favorable to that order, rather than in the light most favorable to the jury verdict. In addition to holding that ***Steuernagel*** had been overruled *sub silentio*, ***Wiley*** at 149, the majority in ***Wiley*** held, in footnote 5 that the cases cited in the dissenting opinion "have been effectively overruled."

favorable light to plaintiff." ***Id.*** at 907. The Court in ***Wiley*** held that by citing ***Dodd***, the Court in ***Firestone*** had overruled ***Steuernagel*** and other earlier cases holding that a reviewing court should view the evidence in the light most favorable to the trial court's remittitur order.

Essentially, this Court in ***Firestone*** held that a trial court abuses its discretion by granting remittitur (or additur) where there is evidence in the record to support the jury's verdict. Both ***Firestone*** and ***Dodd*** are direct corollaries to this case. In each of those cases the trial court entered a remittitur order and then ordered a new trial when plaintiff refused to accept remittitur. Here, the trial court entered an additur order and then ordered a new trial when Defendants/Appellants refused to accept additur. The same standard of review, viewing the evidence in the light most favorable to the jury verdict, properly applies in both situations.

As noted by the Court of Appeals in ***Wiley*** at 148, the statute itself requires the trial court, in considering whether to order remittitur or additur to consider the evidence in the light most favorable to the jury verdict. Specifically, a court may only enter such an order "after reviewing the evidence in support of the jury's verdict". There is certainly no reason that an appellate court should review an additur order under any less deferential light to the jury verdict.

The Eastern District Court of Appeals has also previously applied a standard of review deferential to a jury's verdict when reviewing a trial court order granting remittitur. In ***Crawford v. Shop 'n Save Warehouse Foods, Inc.***, 91 S.W.3d 646 (Mo.App. E.D. 2002), the trial court granted a motion for remittitur and entered judgment in an amount

substantially less than the jury's verdict. The Court of Appeals there found that the trial court abused its discretion because the jury's verdict was supported by testimony about the amount of future medical care the minor plaintiff would need. ***Id.*** at 653-654. **See also** ***Hatch v. V.P. Fair Foundation, Inc.***, 990 S.W.2d 126, 141 (Mo.App. E.D. 1999), wherein the Court stated that "In reviewing whether a verdict is excessive, our review is limited to the evidence supporting the verdict." Similarly, in reviewing whether a verdict is inadequate, an appellate court must review the evidence in a light supporting the jury's verdict.

B. Deference to the Jury Verdict (i.e., Review in the Light Most Favorable to the Jury's Verdict) is Required by Art. I, §22(a) of the Missouri Constitution

Art. I, §22(a) of the Missouri Constitution provides, in relevant part, that "the right of trial by jury as heretofore enjoyed shall remain inviolate...." At a minimum, this provision requires that a trial court, when considering a motion for additur or remittitur, and an appellate court reviewing an order granting such motion, review the evidence in the light most favorable to the jury's verdict. To apply a less deferential standard (i.e., the standard urged by Badahman, by which the evidence would be viewed in the light most favorable to a trial court's additur order) would do violence to a litigant's right to jury trial.[4]

[4] As argued in Point II of this Brief, because additur was unknown at common law prior to adoption of Missouri's Constitution in 1820, any grant of additur, including pursuant to §537.068, violates Article I, §22(a). However, as further expounded here, and argued in the alternative, at a very minimum, Article I, §22(a) requires that a jury's award of

This Court has recently had the opportunity to address Art. I, §22(a), in ***Watts v. Lester E. Cox Medical Centers, et al.***, 376 S.W.3d 633 (Mo.banc 2012),[5] wherein this Court held that §538.210 R.S.Mo., which imposed a cap of $350,000 on non-economic damages in medical malpractice cases, violated a plaintiff's right to trial by jury, and therefore held the statute unconstitutional. In reaching its conclusion, the Court discussed remittitur in some detail.

The Court in ***Watts***, at 639, noted that although early Missouri cases had approved of remittitur, there were also cases that held judicial remittitur was improper. In this regard, the Court quoted from ***Gurley v. Mo. Pac. Ry Co.***, 16 S.W. 11, 17 (1891), wherein the Court refused to remit the damages in a personal injury case because, "[w]hen we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict." The Court in ***Watts*** further expounded that:

> ***Gurley*** stated that if a jury verdict clearly was based on passion or prejudice, the proper remedy was to set it aside in its entirety, but that absent such passion or prejudice, it should be upheld. ***Id.*** Likewise, in ***Rodney v. St. Louis S.W. Ry.***, 127 Mo. 676, 30 S.W. 150, 150 (1895), and again in ***Firestone v. Crown Ctr. Redevelopment Corp.***, 693 S.W.2d 99, 110 (Mo.

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damages be accorded substantial deference, so that it is an abuse of discretion for a trial court to grant additur or remittitur where the jury's verdict is supported by the evidence, when viewed in the light most favorable to that verdict.

[5] This case will be discussed in greater detail in Point II of this Brief.

banc 1985), this Court held that judicial remittitur was not a valid exercise of judicial power.

Although the precedent regarding judicial remittitur is inconsistent precedent, the inconsistency stems from a long-standing reluctance in the common law to tamper with the jury's constitutional role as the finder of fact.

Watts, 376 S.W. 3d at 639.

In support of its decision in ***Watts***, this Court cited, at some length, from a number of opinions from other states that had held caps on non-economic damages to violate their state constitutional provisions that preserved the right to jury trial "inviolate." In many of these cases, the defendants had argued that if remittitur did not violate such a provision, then neither did a cap on damages. As a result, many of these cases discussed, in some detail, the strict limitations on the exercise of remittitur that allowed it to pass constitutional muster.

One of the out-of-state cases cited in ***Watts*** is ***Sofie v. Fireboard Corp.***, 771 P.2d 711 (Wash.banc 1989). In that case, the Washington Supreme Court noted that the constitution assigns to the jury "the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact." ***Id.***, at 716-17, quoting ***James v. Robeck***, 79 Wash.2d 864, 869, 490 P.2d 878 (1971). The Court in ***Sofie*** then entered into a discussion of ***Dimick v. Schiedt***, 293 U.S. 474 (1935), and cited the quotation therein, 293 U.S. at 480, from **Mayne's Treatise on Damages**, at 571: "'in

cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'" ***Sofie*** at 720.

The Court in ***Sofie*** then stated that:

> (A) judge can implement remittitur only under well-developed constitutional guidelines.... The jury's constitutionally protected role is that of the finder of fact and part of this role is to determine the amount of damages in a given case. Because these matters are within the jury's province, there is a strong presumption in favor of their validity. This presumption is codified in statute: RCW 4.76.030. A judge can only reduce a jury's damages determination when it is, in light of this strong presumption, wholly unsupported by the evidence, obviously motivated by passion or prejudice, or shocking to the court's conscience.

Sofie at 721. In other words, the Court in ***Sofie*** held that, in ruling on a motion for remittitur, a trial court must review the evidence in the light most favorable to the jury verdict, and cannot grant remittitur unless the amount of the judgment is wholly unsupported by the evidence. Similarly, because of the constitutional protection of the right to trial by jury, a reviewing court must also review a remittitur order in the light most favorable to the verdict. And, assuming that additur does not violate the constitutional right to jury, this same deferential review must be applied to additur motions and orders.

Another out-of-state case cited favorably by the Court in ***Watts*** is ***Moore v. Mobile Infirmary Ass'n.***, 592 So.2d 156 (Ala. 1991). The defendant there argued that the legislatively imposed damage cap no more impaired a plaintiff's right to jury trial than did

remittitur. While the Alabama Supreme Court agreed that remittitur did not offend Alabama's Constitution, it further acknowledged that such practice "clearly implicate(s) the right to trial by jury." ***Id.*** at 160. The ***Moore*** Court, at 160, then cited to ***Montgomery Light & Traction Co. v. King***, 65 So. 998 (Ala. 1914), a case in which the plaintiff had suffered serious and permanent injury. The Court in held that:

> as the law is, in such a case, unable to furnish a certain rule for the measurement of damages, the jury and the jury alone, in their sound discretion and judgment, after considering all the evidence, had the right to say what sum should be awarded the plaintiff as compensation to her for her injuries. In a case like this a trial court is by the law-which protects and provides for trial by jury-invested with no right to set aside such a verdict upon the ground of excessiveness or inadequacy alone unless the amount allowed by the verdict is so excessive or inadequate as to plainly indicate that the verdict was produced 'by passion or prejudice or improper motive.' In this case, as already said, the amount allowed by the jury was substantial, and in fixing the amount the jury were acting within their exclusive sphere...."

65 So. at 998.

The Court in ***Moore***, at 160, also cited with approval a case decided by the Alabama Court of Appeals, in which it had cautioned:

> To permit a trial judge to substitute his judgment on the facts for that of the jury, or to give undue presumption to the action of the trial judge in dealing with verdicts, would minimize the jury system[, render] juries advisers of the

> trial judge rather than a positive force in the administration of justice, and would be 'an entering wedge' to a destruction of jury trials....

Thompson v. Southern Ry., 85 So. 591, 592-93 (1920) (emphasis added).

Ultimately, the Court in ***Moore*** concluded that: "in cases involving damages that are incapable of precise calculation, a jury's damages assessment may be disturbed only when it is so flawed by bias, passion, prejudice, corruption, or improper motive as to lose its constitutional protection." Similarly, in Missouri, a jury verdict (including the assessment of damages) should only lose its constitutional protection and presumption of validity if there is no set of facts in evidence which supports the jury's verdict.

In ***Armstrong v. Roger's Outdoor Sports, Inc.***, 581 So.2d 414 (Ala. 1991), the Court had before it a statute that permitted a post-verdict review of a punitive damage award by the trial judge without any presumption of correctness in favor of the jury's award. In a per curiam opinion, this statute was struck down by the Alabama Supreme Court. In a concurring opinion in ***Armstrong***, Justice Kennedy stated that several earlier holdings by the Court, "necessarily imply that the right to trial by jury includes the presumption that a verdict is correct." ***Id.*** at 421. Justice Kennedy's opinion was quoted approvingly, at length in ***Moore***. Specifically, the ***Moore*** Court quoted that portion of Justice Kennedy's opinion in which he stated:

> Destruction of the presumption of correctness that attends the verdict degrades the verdict to nothing more than a preliminary advisory decision of ephemeral weight and substance, meaningful and significant only insofar as it comports with the decision of the trial court, which, with no necessary

> regard for the verdict, determines what it will award....To destroy the presumption of correctness that attends the verdict and thus to allow the trial court and appellate courts to rule without regard to the verdict violates the right of trial by jury at its most fundamental level."

Moore, at 162; ***Armstrong*** at 421.

This Court recognized this premise in ***Williams By and Through Wilford v. Barnes Hosp.***, 736 S.W.2d 33, 38-39 (Mo. 1987) by stating:

> Our Constitution guarantees "[t]hat the right of trial by jury ... shall remain inviolate...." Mo. Const. art. I, sec. 22(a). We entrust to our juries the fortunes and futures of all who come before them. This Court has consistently deferred to and placed great confidence in the verdicts of juries, realizing that the jury system remains our brightest hope for achieving justice between litigants. This Court's efforts to protect the products of juries from judicial invasion led to the abolition of remittitur in ***Firestone v. Crown Center Redevelopment Corp.***, 693 S.W.2d 99 (Mo. banc 1985)....

The standard of review urged by Badahman (deference to the trial court's order granting additur) would, similar to the statutes at issue in ***Moore*** and ***Armstrong*** (and ***Watts***), destroy the presumption of correctness attaching to the jury verdict, and replace it with the presumption that the trial court was correct in granting additur (or remittitur). Such a standard would violate Art. I, §22(a), by impermissibly invading the province of the jury. Clearly, then, the correct standard of review is one which views the evidence in the light most favorable to the jury's verdict. It follows then, that the trial court must be held to

have abused its discretion if any set of facts placed in evidence at the trial support the jury's determination of damages.

C. No Basis Exists to Grant Additur so as to Award Badahman All of Her Claimed Lost Wages.

Additur inherently has two components: (1) a finding that a new trial is required, (2) unless the defendant consents to increasing the judgment. ***Tucci v. Moore***, 875 S.W.2d 115, 116 (Mo. banc 1994). Thus, before considering additur, the trial judge must find that a new trial on damages is warranted for "good cause shown" or because "the verdict is against the weight of the evidence." ***Id.***, *citing*, Missouri Rules of Civil Procedure 78.01, 78.02. This Court explained this premise in ***Massman Const. Co. v. Missouri Highway & Transp. Comm'n***, 914 S.W.2d 801 (Mo. banc 1996) as follows:

> A new trial is one potential outcome of the motion for additur. Nonetheless, a motion for additur significantly differs from an ordinary motion for new trial in terms of issues covered and in terms of the potential outcome. The purpose of additur, like remittitur, is not to correct juror bias and prejudice, but to correct a jury's honest mistake in fixing damages. ***Skadal v. Brown,*** 351 S.W.2d 684, 689 (Mo.1961); ***Knox v. Simmons,*** 838 S.W.2d 21, 23 (Mo.App.1992). By contrast, an ordinary motion for a new trial deals with all prejudicial errors occurring during trial, including damages to the extent a verdict is the product of juror bias and prejudice, and is remedied by the grant of a new trial. ***Deaner v. Bi–State Dev. Agency,*** 484 S.W.2d 232, 233 (Mo.1972); ***Day v. Union Pacific R.R. Co.,*** 276 S.W.2d 212, 216 (Mo.1955).

> A motion for additur focuses on the adequacy of the verdict in terms of damages and, if sustained, has two possible outcomes, an increase in the amount of the verdict upon defendant's consent, or a new trial. ***Tucci,*** 875 S.W.2d at 116. When grounds for additur exist, a trial court may grant a new trial only if defendant refuses to accept an increased verdict. ***Id.***

Massman at 803 (emphasis added). Consequently, the trial court's reduction or addition of the jury award by remittitur or additur, respectively, constitutes a ruling upon the weight of the evidence. ***Ricketts v. Kansas City Stock Yards,*** 537 S.W.2d 613, 621 (Mo.App. W.D. 1976).

Additur is statutorily authorized in Missouri by § 537.068, R.S.Mo. Supp.1991, although the statute does not use the term "additur." The statute was adopted as part of the "Tort Reform Act," and gives the trial court discretion to increase the jury's verdict if the trial court finds the verdict is less than fair and reasonable compensation for the injured party's damages. ***Bishop v. Cummines***, 870 S.W.2d 922, 923-24 (Mo. App. W.D. 1994). The reasons for setting aside verdicts for excessive damages apply equally to cases of inadequate damages. ***Grodsky v. Consolidated Bag Co.,*** 26 S.W.2d 618, 623–24 (Mo. 1930).

In ***Bishop, supra***, relied on by Badahman in the trial court, and the other cases relied on by Badahman, the only item of damages was medical expenses, and in each of these cases the amount was undisputed. ***Id.*** at 926.

For example, in ***Norris v. Barnes***, 957 S.W.2d 524, 528 (Mo.App.W.D. 1997), the plaintiff introduced evidence as to the amount of her medical bills. Thereafter, the

defendant disputed this amount, although acknowledged the amount in closing statement. ***Id.*** at 529. The court held this to be a judicial admission as to the amount. ***Id.*** Thus, the amount became undisputed. ***Id.*** Under those circumstances, the court found that additur was proper and should have been granted. ***Id.***

Similarly, in ***Hagedorn v. Adams***, the parties had stipulated to the amount of the plaintiff's medical bills. 854 S.W.2d 470, 477 (Mo.App. W.D. 1993). A stipulation dispenses with the need to prove the necessity and reasonableness of medical bills. ***Id.*** Like the judicial admission in ***Norris***, the stipulation makes the damage amount undisputed or uncontested. The court in ***Hagerdorn*** found additur appropriate to amend the jury's mistake to increase the damage award to the stipulated, and thus uncontested, amount. ***Id.***[6]

Additur is most often used in cases involving damages that are based on a simple mathematical calculation. ***Bishop***, 870 S.W.2d at 923. In the instant case, however, there was no stipulation or admission that Badahman's claimed lost wages arose from CSL and Erker's alleged discriminatory acts. The alleged damages were contested. Badahman still had the burden to prove that she was damaged because of CSL and Erker's alleged discrimination, i.e., that she lost wages as a result of CSL and Erker's alleged

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[6] See also, ***Brown v. Lanrich, Inc.,*** 950 S.W.2d 235 (Mo.App.E.D. 1997), where the jury awarded damages of $1.00, although plaintiff had proven medical expenses in the amount of $7,684.32. There was no dispute that these medical expenses were incurred as a result of the plaintiff's personal injury and not from some other cause, such as a pre-existing condition.

discriminatory acts and/or that she was emotionally damaged by their actions. When the amount of damages is disputed at trial and involves determinations of weight and credibility, such decisions fall to the jury. *See,* ***Tomlin v. Guempel,*** 54 S.W.3d 658, 660 (Mo.App. E.D. 2001). It was solely up to the jury to decide whether Badahman lost wages or was emotionally damaged as a result of CSL/Erker's alleged discriminatory acts and, if so, in what amount.

Here, the jury could have decided that Badahman lost wages as a result of CSL/Erker's alleged discriminatory acts for only the time that she was out of work (August 1, 2008 to October 2008), i.e., prior to getting a job with Gateway Healthcare. It is undeniable that the jury's verdict of $11,250 in actual damages (L.F. 87) is precisely equal to three months' salary at the rate that Badahman was paid during her employment with CSL (i.e., annual salary: $45,000/12 months = $3,750 x 3months = $11,250). This comports with the evidence that Badahman was out of work for approximately two to three months after being terminated by CSL. TR 86. Moreover, the jury could have decided that she did not prove that the difference between her CSL and post-CSL employment income was the result of discrimination.

For instance, the jury could have found that Badahman chose to take the job with Gateway in Illinois because it was much closer to her home in Illinois than other jobs which might have paid her more, or because it would allow her to work with her brother-in-law. TR 87. Indeed, she testified that one reason she had applied for the job at CSL was because it was closer to her home than the Kelly Services office in Westport where she had previously worked. TR 45.

Badahman also testified that Kelly had given her an oral release from the non-compete agreement she had executed while employed by it and told her about a job with Manpower. TR 85. When Manpower decided not to hire Badahman because of the non-compete, she did not try to get a written release of the non-compete from Kelly Services. TR 179-80. This position would have been similar to previous jobs held by Badahman (including at Kelly Services), but she chose not to pursue an obvious course of action which might have allowed her to obtain the job, which apparently paid more than the job at Gateway. When asked whether the Manpower job paid more than $40,000 per year, Ms. Badahman testified that she could not recall. TR 181. The jury could very well have concluded that she took the job at Gateway because it was convenient, and that had she wanted to she could have obtained a better paying job.

Or, the jury could have decided that Badahman would not have continued to work at CSL for more than one or two months, if she had not been terminated, because of the transportation problems she was having. For instance, she testified that the one time she took a taxi cab from the Boathouse to her home after losing her license, it was "expensive." TR 153. She also agreed that she could not rely on co-workers for transportation. TR 167. CSL presented testimony that in the two weeks Badahman was working without a driver's license, she did not attend any catering functions or recruiting events, which are both a regular part of her employment. TR 178. Badahman did not have her driving privileges returned until January 2010. TR 165. Or, it is quite possible that this was a compromise verdict, with some jurors agreeing to find CSL and Erker liable only if damages were awarded solely for the three months that Badahman was unemployed.

The jury is the fact finder and made a decision in this case about what damages it believed Badahman suffered as a result of discrimination by CSL. It is not appropriate for Badahman to speculate as to why the jury did not grant her the entire amount of lost wages sought, and it was not appropriate for the trial court to conclude that the jury was required to find Badahman entitled to the entire amount claimed by her to be lost wages. The jury was free to consider and make inferences from the evidence presented at trial in determining the proper amount of damages. *See* ***Vaughn v. Taft Broadcasting Co.***, 708 S.W.2d 656, 661 (Mo. banc 1986) (jury may infer facts from evidence); *see also* ***Hatch***, 990 S.W.2d at 141 (jury determines damages, and the appellate court reviews that determination in the light favorable to jury verdict).

The principals relied upon by the court of appeals in ***Root v. Manley***, 91 S.W.3d 144, 146 (Mo.App. E.D. 2002) are equally applicable here. There, the plaintiff put into evidence proof of medical bills and sought further damages for pain and suffering. The amount of medical bills was still disputed. The jury returned a verdict of $957.23 – exactly $100 more than the bills from her visit to the emergency room on the day of the accident. ***Id.*** at 147. Examining the adequacy of this verdict the court of appeals found no evidence of juror error or misconduct and held that, "[t]he jury very well may have attributed the other medical bills to the pre-existing condition," or not believed Plaintiff's subjective complaints. ***Id.*** The "jury is charged with the task of weighing witness credibility and testimony, and the amount of damages awarded falls primarily within their discretion." ***Id.*** at 146. As a result, the court of appeals held that the trial court did not err by refusing additur, stating that additur is only appropriate upon a finding that a new trial is warranted

for good cause or the verdict is against the weight of the evidence. ***Id.*** Because the verdict did not result from the jury's honest mistake in fixing damages, and because the court concluded that its verdict was not inadequate, it held that the trial court did not abuse its discretion in refusing to grant a new trial (finding that a new trial is warranted is a prerequisite to an award of additur). ***Id.*** This same standard of deference to the jury is to be applied by the trial court in ruling on a motion for additur. ***Wiley***, *supra*. Because the evidence viewed in the light most favorable to the jury verdict here supported the jury's damage award, it was an abuse of discretion for the trial court to grant Badahman's Motion for Additur.

In ***Tomlin v. Guempel***, 54 S.W.3d 658, 660 (Mo.App. E.D. 2001) the court of appeals held that where the Court did not find any evidence of juror misconduct or gross abuse of discretion, a new trial should not be granted solely upon the basis plaintiff claims its award is inadequate. This holding relies upon the well-established principle that the determination of damages is principally within the jury's discretion. ***Id.*** "The jury's discretion includes accepting or rejecting all or part of the plaintiff's claimed expenses." ***Id.*** at 660, *citing*, ***Havel v. Diebler***, 836 S.W.2d 501, 504 (Mo.App.W.D. 1992). Only where the jury's verdict is so shockingly inadequate to indicate it is a result of passion or prejudice or a gross abuse of discretion should the trial court invade the jury's province and grant a new trial. ***Id.*** Thus, additur should be denied where the trial court finds a new trial should be denied. ***Tomlin*** at 661.

A trial court may also grant a new trial where the verdict is glaringly inadequate. ***Niccoli v. Thompson***, 713 S.W.2d 579 (Mo.App. W.D.1986). However, "[i]f a damage

award is within the range of the evidence, a jury's verdict is not erroneous although the amount is not precisely in accordance with the evidence of either party. ***DeLong v. Hilltop Lincoln-Mercury, Inc.***, 812 S.W.2d 834, 841 (Mo.App. E.D. 1991)." ***Total Econ. Athletic Mgmt. Of Am., Inc. V. Pickens***, 898 S.W.2d 98, 108 (Mo.App.W.D. 1995). Typically, a plaintiff arguing that a verdict is inadequate must couple the claim of inadequacy with evidence of misconduct on the part of the defendant or the jury. ***Knothe v. Belcher***, 691 S.W.2d 297 (Mo.App. W.D. 1985); *see also*, ***Artstein v. Pallo***, 388 S.W.2d 877 (Mo. banc 1965) (grossly inadequate verdict is convincing evidence of bias or prejudice on the part of the jury); ***State ex rel. State Highway Commission v. Klipsch***, 414 S.W.2d 783 (Mo. banc 1967) (inadequate verdict was against the weight of the evidence).

In ***Wiley, supra***, the court discussed the limitations on a trial court's discretion to apply remittitur. In doing so, it relied on this Court's ***Firestone*** opinion, noting that this Court stated therein that:

> "The jury is vested with a broad discretion in fixing fair and reasonable compensation to an injured party" and held that where the record contains evidence that would support the jury's award, "(s)uch a record does not authorize a trial court in the exercise of reasonable discretion to order any portion of it remitted." ***Id.*** at 109-110. For this reason, the Court found an abuse of discretion on the part of the trial court and restored the jury's verdict. ***Id.*** at 110.

Wiley, 307 S.W.3d at 149. The court in ***Wiley*** then held that, because the legislature had not changed the standard of review adopted and applied in ***Firestone***, it still applied to

cases appealing a grant of remittitur. ***Id.*** at 150. The court noted that, in ***Crawford ex rel. Crawford v. Shop 'N Save Warehouse Foods, Inc.***, 91 S.W.3d 646 (Mo.App. E.D. 2002), the Eastern District viewed the evidence in the light most favorable to the verdict to determine whether the jury's award of future medical expenses was supported by substantial and competent evidence and went on to hold that the trial court erred in remitting the verdict where the evidence, so viewed, supported the jury's verdict. ***Id.*** at 653-54.

The court in ***Wiley***, at 150-152, went on to hold that, based on the evidence adduced at trial, reasonable minds could differ as to the need for future medical treatment, and the trial court's order of remittitur could not be affirmed when viewed in the light most favorable to the jury's verdict, so that the trial court abused its discretion in ordering remittitur.

Similarly, here, when viewed in a light most favorable to the jury's verdict, the evidence supports its award of only $11,250 in actual damages. Thus, the trial court abused its discretion in ordering additur. No basis existed here to grant Badahman a new trial, either because of the inadequacy of the damages awarded or because the verdict was against the weight of the evidence (the trial court here based its finding that the verdict was against the weight of the evidence solely on its conclusion that the damages were inadequate), so that the trial court's order granting additur or in the alternative a new trial as to damages only was an abuse of discretion. The trial court order should therefore be reversed and the case remanded for the trial court to reinstate the jury's verdict.

There Are No Grounds For Additur When The Jury Verdict Conformed To The Instructions Given.

The instructions, as submitted by Badahman, instructed the jury to "award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the occurrence mentioned in the evidence." Appendix A15. The instructions did not instruct the jury to find lost wages for the entire period that she was out of work and the period that she received reduced wages. Further, during closing argument, Badahman's attorney stated, "Again, the amount is up to you, but I'm going to suggest that you fully compensate Ms. Badahman for her lost wages in the amount of $44,979, [and] that you award her an additional $150,000 to compensate her for the emotional distress that she has suffered." TR 447-448. Badahman neither asked for a jury instruction which would have required the jury to return a verdict for her in an amount at least as much as her claimed last wages in the event it returned a verdict for her (which Appellants believe would have been error), nor did her counsel suggest in closing argument to the jury that, if it found for Badahman, it must award her at least the full amount of her claimed lost wages.

Although a denial of a remittitur case, ***Ralph v. Lewis Bros. Bakeries, Inc.***, 979 S.W.2d 509 (Mo.App.S.D. 1998) is compelling on the importance of the jury instructions submitted by Badahman. There, employee claimed that he was discharged in retaliation for filing a workers' compensation claim. The jury returned a monetary award in the employee's favor. Employer argued on appeal that the trial court erred in failing to grant its motion for remittitur because the only "fair and reasonable compensation" for employee

would have excluded wages and lost insurance benefits after the time when the Social Security Administration adjudged employee disabled. ***Id.*** at 516.

The court noted first that "[t]he amount of a damage award is, under proper instructions, a matter resting within the sound discretion of the jury." ***Id.*** (citations omitted). Second, and importantly, the employer never objected to the damages instruction given as being a misstatement of the law, nor did it offer a limiting or withdrawal instruction. ***Id.*** at 517. The court then found that "[c]onsidering the instruction given to this jury, we cannot convict it of a 'simple mistake in weighing the evidence' that resulted 'in awarding disproportionate damage.'".... especially where "ample evidence exists to support the verdict based on the instruction given." ***Id.***

Similarly here, in light of the instruction given to the jury allowing them to determine the appropriate amount of damages, and the argument made to the jury, the jury did not err by awarding damages only for the time that Badahman was unemployed. After the jury weighed the evidence and arguments before it and received instructions to come to a fair and just amount of compensation, the jury determined, in its discretion, that $11,250 was fair and reasonable. This amount was not against the weight of the evidence and thus a new trial was not warranted. Without grounds for a new trial, the trial court abused its discretion in granting additur. *See*, ***Tucci v. Moore***, ***supra*** at 116. Therefore, this Court should reverse the trial court's additur order and remand with instructions to enter judgment on the jury verdict.

II. THE TRIAL COURT ERRED IN GRANTING BADAHMAN'S MOTION FOR ADDITUR BECAUSE §537.068 RSMO, AND MO.S.CT. RULE 78.10, TO THE EXTENT THAT THEY PERMIT ADDITUR, ARE AN UNCONSTITUTIONAL INVASION OF A LITIGANTS' RIGHT TO TRIAL BY JURY AS GUARANTEED BY ARTICLE I, §22(a) OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE AND RULE ALLOW THE TRIAL JUDGE TO SUBSTITUTE HIS JUDGMENT FOR THAT OF THE JURY AS TO THE PROPER AMOUNT OF DAMAGES, AND IN THAT ADDITUR, UNLIKE REMITTITUR, WAS NOT RECOGNIZED BY THE COMMON LAW AT THE TIME THE MISSOURI CONSTITUTIONAL PROVISION PROTECTING THE RIGHT TO A JURY TRIAL WAS ADOPTED.

Standard of Review

> When considering the legal issue of the constitutionality of a statute, this question of law is to be reviewed de novo. ***City of Arnold v. Tourkakis***, 249 S.W.3d 202, 204 (Mo. banc 2008). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" ***Board of Educ. of City of St. Louis v. State***, 47 S.W.3d 366, 368–69 (Mo. banc 2001) (internal citations omitted).

Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ., 271 S.W.3d 1, 7 (Mo.banc 2008).

Both §537.068 R.S.Mo. and Mo.S.Ct. Rule 78.10 Violates Art. I, §22(a), of the Missouri Constitution to the Extent that the Permit Additur

"Article I, section 22(a) is one of the fundamental guarantees of the Missouri Constitution, providing 'the right of trial by jury as heretofore enjoyed shall remain inviolate.'" ***Watts v. Lester E. Cox Medical Centers, et al.***, 376 S.W.3d 633, 637 (Mo.banc 2012). By allowing a Judge to set aside the jury's determination as to the amount of damages and order an increased damage award, both §537.068 R.S.Mo. and Mo.S.Ct. Rule 78.10 invade the province of the jury, and deny a litigant his rights under Art. 1, §22(a). This Court in ***Watts*** stated that there are two steps involved in analyzing whether a statute violates Art. I, §22(a). First, the Court analyzes whether the cause of action affected is included within "the right to trial by jury as heretofore enjoyed." ***Id.*** at 637-38. This Court has already answered this question "yes" in ***State ex rel. Diehl v. O'Malley***, 95 S.W.3d 82 (Mo. banc 2003), in which it held there was a right to a jury trial in an action filed under the Missouri Human Rights Act.

The second step in the analysis is "to determine whether the right to trial by jury 'remain[s] inviolate'" when a court order applies the statute or practice in question. ***Watts*** at 638. This Court stated in ***Watts*** that:

> The plain meaning of the word "inviolate" means "free from change or blemish, pure or unbroken." Webster's Third New International Dictionary 1190 (1993). Therefore, if the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not "remain inviolate" and the cap is unconstitutional.

In addressing what is meant by the term inviolate in Washington state's guarantee of the right to jury trial, the Court in ***Sofie v. Fireboard Corp, supra.***, 771 P.2d at 721-22, stated:

> The term "inviolate" connotes deserving of the highest protection. Webster's Third New International Dictionary 1190 (1976), defines "inviolate" as "free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ..." Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

See also ***Lakin v. Senco Products, Inc.***, 987 P.2d 463, 468 (Ore. 1999) which notes that the 1828 edition of the Noah Webster, American Dictionary of the English Language, Vol. I, p. 113 (which was published a mere 8 years after adoption of Missouri's Constitution) defined "inviolate" to mean "unhurt; uninjured; unprofaned, unpolluted; unbroken." The Court in ***Lakin*** also cited to the 1889 edition of The Century Dictionary, Volume III, p. 3174, as defining inviolate to mean "not violated; free from violation or hurt of any kind; secure against violation or impairment."

To determine both the nature and scope of the right to trial by jury as "heretofore enjoyed," a court must assess the state of the common law when the Missouri Constitution was adopted in 1820. ***Watts*** at 638, citing ***Diehl*** at 85.

The United States Supreme Court held in ***Dimick v. Schiedt***, 293 U.S. 474 (1935) that additur violates a litigant's right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. The Seventh Amendment provides that "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." ***Id.*** at 476. In ***Dimick***, although the Court reluctantly agreed that remittitur is permissible under the Constitution, it specifically held that additur is not. *See* ***Gasperini v. Center for Humanities, Inc.***, 518 U.S. 415, (1996) (citing the holding in ***Dimick*** as still good law).

"The impermissibility of additur and permissibility of remittitur are based on the Supreme Court's determination in ***Dimick v. Schiedt*** that judicially increasing a verdict award violates the Seventh Amendment's right to trial by jury, while decreasing the award does not." Joseph R. Posner, Rethinking the Additur Question in Federal Courts, 16 Suffolk J. Trial 8 App. Advoc. 97, 98 (2011).

Specifically, the U.S. Supreme Court in ***Dimick*** was able to find some history of courts remitting damages prior to adoption of the Seventh Amendment, while it could find no similar history of additur. 293 U.S. at 482.

In ***Klotz v. St. Anthony's Medical Center***, 311 S.W.3d 752 (Mo. banc 2010),[7] this Court stated:

> The common law precedents involving the judge's power to grant a new trial, or order remittitur, are reviewed in ***Dimick v. Schiedt***, 293 U.S. 474, 55 S.Ct.

[7] This Court also briefly discussed ***Dimick*** in the ***Watts*** case.

296, 79 L.Ed. 603 (1935). The analysis of the right to jury trial in federal courts under the 7th Amendment to the United States Constitution is the same historical analysis as that required for Missouri's right to jury trial. ***Diehl v. O'Malley***, 95 S.W.3d 82 (Mo. banc 2003)] at 84–85. The 7th Amendment, guaranteeing the right to jury trial in civil cases, says that "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The right to jury trial in federal courts is determined as to the incidents of jury trials in 1791, when the 7th Amendment was adopted, whereas the Missouri analysis uses 1820, the year the Missouri Constitution first was adopted. ***Diehl***, 95 S.W.3d at 84–86. In ***Dimick***, the Supreme Court could find little support at common law for a judge's revision of a jury's verdict as to damages. The Supreme Court, however, cited a decision by Justice Story in 1822, sitting as a circuit judge, granting a new trial unless the plaintiff remitted a portion of the damages. 293 U.S. at 482–483, 55 S.Ct. 296. This remittitur procedure has been followed since in the federal courts.

311 S.W. 3d at 780 (emphasis added).

Even if a difference of language exists between the Seventh Amendment and Art. I, §22(a), of the Missouri Constitution, this Court has made clear in ***Klotz*** and ***Diehl*** that the analysis used by the U.S. Supreme Court in analyzing whether a particular procedure violates the Seventh Amendment is the same analysis that Missouri courts are to follow in

analyzing a claim of violation of Art. I, §22(a). Thus, while this Court upheld the constitutionality of remittitur in ***Klotz***, it had previously questioned its constitutionality in ***Firestone v Crown Center Redevelopment Corp***, 693 S.W.2d 99 (Mo. banc 1985), wherein the Court abolished remittitur, and stated that:

> As indicated at the outset, this case lends emphasis to the problems and conflicting philosophies associated with the remittitur practice and demonstrates a basis for its abolishment. The doctrine is not a provision of statute or rule in Missouri. It has been impressed by practice on the new trial consideration where its application constitutes an invasion of the jury's function by the trial judge. Such applications have been fraught with confusion and inconsistency. Its application in the appellate courts has been questioned since its inception in Missouri as an invasion of a party's right to trial by jury and an assumption of a power to weigh the evidence, a function reserved to the trier(s) of fact. See ***Burdict v. Missouri Pacific Railway Co.***, 123 Mo. 221, 27 S.W. 453, 458–466 (1894) (Barclay, Gantt, and Sherwood, JJ., dissenting).

Firestone, at 110.

Ultimately the Missouri Legislature re-established remittitur by statute; however, §537.068 is unconstitutional on its face with regard to additur, in that this practice did not exist at common law in Missouri in 1820, when the State's first constitution, with a provision identical to present day Art. 1 §22(a), was adopted. Similarly, Mo.S.Ct. Rule 78.10, which governs additur, also violates Art. I, §22(a).

Appellants were unable to find any reported cases of additur prior to 1820. Thus, it cannot be argued that this was a recognized restriction on the right to a jury trial at the time the Missouri Constitution was adopted. As this Court held in ***Watts***, any change that imposes upon, trespasses against, or impinges a litigant's right to a jury trial (including the right to have damages decided by a jury), as such right was recognized by the common law in 1820, violates Art. I, §22(a).

Appellants have been unable to find any case in which the constitutionality of additur has been directly addressed by a Missouri court. For example, in ***Bishop v. Cummines***, 870 S.W.2d 922 (Mo.App.W.D. 1994), the court noted that the constitutionality of additur had not been raised there.

The courts of this state have noted that there is a major difference between remittitur and additur. In the majority opinion in ***Burdict, supra***, at 458, the Court stated:

> An argument pressed upon our consideration in this case is this: That, if this court has the right and power to reduce the damages when excessive, it has the right and power to increase them when inadequate. We do not see the force of this line of argument. In one case the court simply says the judgment may stand for a part of the amount found by the jury, while in the other case it would add something never within the terms of the verdict.

Id. at 458.

Thus, the Court in ***Burdict*** stated, albeit in dicta, that the grounds for allowing remittitur would not justify additur, because additur involved a judge ordering damages

wholly outside of, and beyond, the jury's verdict. This distinction was additionally recognized in ***Bishop***, wherein the Court stated:

> The authority of Missouri trial courts to enter remittitur was established many years ago. See ***Burdict v. Missouri Pac. Ry. Co.***, 123 Mo. 221, 238–41, 27 S.W. 453, 456–57 (Mo. banc 1894), for a collection of cases concerning remittitur that pre-date the 1894 decision. The Burdict court specifically rejected additur, reasoning that remittitur is simply allowing the judgment of the jury to stand for part of the amount found by the jury, while additur adds money that was never within the terms of the verdict. ***Id.*** at 241, 27 S.W. at 458.
>
> Although there are Missouri cases that have increased the jury's verdict which make reference to the doctrine of additur, there are other cases that clearly state that the doctrine of additur has never been formally adopted in Missouri (at least until the passage of § 537.068.) It was held early in Missouri's case history that a court could not require a successful defendant to consent to judgment against himself for part of his adversary's claim as a condition of the overruling of a motion for a new trial. ***Kortjohn v. Altenbernd***, 14 Mo. App. 342, 344–45 (1883). Missouri has held that when the plaintiff's damages are inadequate, a new trial should be granted outright. ***King v. Kansas City Life Ins. Co.***, 350 Mo. 75, 88, 164 S.W.2d 458, 465 (1942). **See** ***Worley v. Tucker Nevils, Inc.***, 503 S.W.2d 417, 424 (Mo. banc 1973) (stating that Missouri has never adopted the additur doctrine);

Stahlheber v. American Cyanamid Co., 451 S.W.2d 48, 65 (Mo.1970) (declining to adopt additur as a means of resolving inadequate verdicts).

Bishop, 870 SW 2d at 924-25.

To the extent that any Missouri court has permitted additur (as discussed in ***Bishop*** at 925)[8], these cases are against the weight of historical evidence, which indicates that additur was not permitted at common law at the time the first Missouri Constitution was adopted. Both §537.068 and Mo.S.Ct. Rule 78.10, to the extent that they allow a trial court to enter an order of additur, permit an imposition on the right to jury trial not recognized in the common law at the time Missouri adopted its constitution. Thus, both the statute and rule, to the extent that they permit additur, violate Art. I, §22(a), of the Missouri Constitution, no less so than the statutory damage cap found unconstitutional in ***Watts***.

As the U.S. Supreme Court noted, increasing an award by the court "bring[s] the constitutional right of the plaintiff to a jury trial to an end in respect to a matter of fact which no jury has ever passed upon either explicitly or by implication... To so hold is obviously to compel the plaintiff to forego his constitutional right to a verdict of a jury...." ***Dimick***, 293 U.S. at 486-487.

Moreover, this Court in ***State ex rel. Diehl v O'Malley*** further recognized: The right to trial by jury, where it applies, is a constitutional right, applies regardless of any

[8] Additionally, Badahman's claim for lost wages is not the type of claim for liquidated damages to which additur was applied, prior to passage of §537.068.

statutory provision and is beyond the reach of hostile legislation. 95 S.W.3d 82, 92 (Mo banc 2003). **Accord,** ***Watts*** at 640.

In 2010, this Court confirmed this point in ***Klotz***:

> The function of the jury is fact-finding, which includes a determination of the amount of plaintiff's damages. The concept of jury as the fact finder is rooted in Missouri's history as is the idea that its verdict should not be disturbed.

311 S.W. 3d at 777.

The idea that the province of the jury is to remain inviolate is irreconcilable with the idea a trial court in its discretion may adjust the jury's findings to increase damages beyond the amount found by the jury as the trial court believes is necessary to fully compensate the plaintiff (particularly as additur was unknown at the common law prior to adoption of the Missouri Constitution). Either the jury's province remains inviolate or our Constitution's sacred text is deserving of an asterisk to account for Missouri's judges' abilities and authority to override the jury and increase damages. The Missouri Constitution contains no such footnote. Art. 1, §22(a), does not include a "but if". The text reads that the right to a jury trial shall remain inviolate and our Constitution is to be applied and interpreted based upon the plain meaning of its text. ***StopAquila.org v City of Peculiar***, 208 S.W.3d 895 (Mo. banc 2006).

Thus, the statute permitting additur, §537.068, and related Rule 78.10, are unconstitutional on their face, at least insofar as they permit additur. The trial court's grant

of additur and a new trial on damages should be reversed and remanded for the trial court to reinstate the jury's verdict of $11,250.

III. THE TRIAL COURT ERRED IN ENTERING AN ORDER GRANTING A NEW TRIAL ON DAMAGES ONLY BECAUSE EVEN IF IT IS NOT UNCONSTITUTIONAL FOR A TRIAL COURT TO GRANT ADDITUR, THE PORTION OF MISSOURI SUPREME COURT RULE 78.10 WHICH PERMITS A COURT TO GRANT A NEW TRIAL AS TO DAMAGES ONLY WHEN A PARTY REJECTS ADDITUR IS AN UNCONSTITUTIONAL INVASION OF A LITIGANT'S RIGHT TO TRIAL BY JURY, IN THAT IT ALLOWS THE JUDGE TO ESSENTIALLY DECIDE THE ISSUE OF LIABILITY.

Standard of Review

The standard of review as to the constitutionality of a Supreme Court Rule is the same as that for review of the constitutionality of a statute, de novo, as stated in Point II.

Allowing the Trial Court to Grant a New Trial as to Damages Only Invades the Province of the Jury.

Supreme Court Rule 78.10 provides that if a trial court orders additur or remittitur that the order shall give either party the right to elect a new trial, with the court being granted the discretion to grant a new trial on all issues or as to damages only. Even if additur is held not to invade the province of the jury, to the extent that Rule 78.10 permitted the trial judge here to present Appellants Erker and CSL the choice to either accept additur or a new trial as to damages only, this impermissibly denies Erker and CSL their right to trial by jury.

In his additur order, the Honorable Judge Bush stated that "the evidence for liability was far from overwhelming..." L.F. at 115. However, rather than giving Appellants a choice between additur or a new trial as to all issues, the trial court ordered that Appellants either accept additur or elect a new trial as to damages only. Essentially, while rejecting the jury's findings as to the amount of damages, the trial court accepted its finding of liability, as permitted under Rule 78.10(b). Thus, the Rule allows a trial judge to pick and choose which portions of a jury verdict to accept or reject.

Upon retrial of the damages issue, a new jury will be informed that the issue of liability has already been determined, that its only role is to determine the amount of damages to be awarded against the Defendants/Appellants, including, apparently, potentially punitive damages, when the previous jury found that Erker was not liable for any punitive damages and that CSL was liable for only $2,000.00 in punitive damages. Essentially, the new jury will be given a roving commission to determine how much to compensate Badahman, in a case in which the trial judge acknowledged that the evidence of liability was "far from overwhelming", and in which certain evidence presented at the first trial may be excluded as irrelevant to the issue of damages. Nor will the trial judge or the appellate court be able to remit damages if the jury awards excessive damages, as Rule 78.10(e) provides that an award of additur or remittitur may not be granted "more than once on the ground that the damages are against the weight of the evidence."

Juries are supposed to be the ultimate fact finders in jury tried cases. ***Williams By and Through Wilford v. Barnes Hosp.***, 736 S.W.2d 33, 38-39 (Mo. 1987). *Accord,* ***Klotz,*** 311 S.W. 3d at 777. To allow a judge to pick and choose which portion of a jury verdict to

accept, and which to reject, clearly invades the province of the jury as the fact finder, and clearly violates Art. I, §22(a).

IV. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY IN THAT THE ISSUES OF LIABILITY AND DAMAGES ARE SO INTERTWINED THAT ANY NEW TRIAL SHOULD BE AS TO BOTH DAMAGES AND LIABILITY.

Standard of Review

A trial court's judgment granting a new trial will only be overturned upon a finding of manifest abuse. ***Stehno v. Sprint Spectrum, L.P.***, 186 S.W.3d 247, 250 (Mo. banc 2006).

It was an Abuse of Discretion for the Trial Court to Order a New Trial as to Damages Only.

Where a defendant refuses to accept an increased verdict, a new trial as to both liability and damages is appropriate where the issues of liability and damages are significantly intertwined. ***Massman Const. Co. v. Missouri Highway & Transp. Comm'n.***, 948 S.W.2d 631, 634 (Mo.App.W.D. 1997). In Massman, the court found that the trial court abused its discretion in presenting the defendant with a choice between additur and a new trial on damages only. ***Id.*** The court acknowledged that in certain cases a new trial on damages only may be helpful, but that this is not the case where the issues of liability and damages are significantly intertwined. ***Id.*** *Accord* ***Zibung v. Union Pacific R. Co***, 776 S.W.2d 4 (1989).

While this Court ruled in ***Burnett v. Griffith***, 769 S.W.2d 780, 791 (Mo. banc 1989), that where there is no question as to the jury's verdict as to liability, it is appropriate to allow a retrial on the issue of punitive damages only, because a plaintiff should not have to risk a proper verdict on actual damages where the trial court refused to submit instructions to the jury on punitive damages, that ruling (and its progeny) is inapposite here. First, retrial has been ordered here as to both actual and punitive damages. Second, the trial court's order granting additur makes clear that even it questioned the adequacy of the evidence regarding liability. L.F. 115.

This Court in ***Burnett*** made clear that there were no hard and fast rules as to when a retrial would be allowed as to punitive damages only. But here, there will be no judicial economy achieved by trying only the issue of damages, particularly because of the punitive damages issue. All of the evidence regarding why CSL and Erker decided to terminate Badahman's employment will again have to be put into evidence for the jury to determine whether Erker or CSL acted with the requisite evil motive or reckless indifference to Badahman's rights so as to justify punitive damages. Further, here, it is the Appellants who have been forced to choose between a favorable punitive damages ruling, which Badahman did not challenge in her Motion for Additur, and a new trial as to damages only. Here, the issue of liability was not clear, and the issues of damages and liability are so intertwined that any new trial should be as to all issues, and not just limited to the issue of damages.

CONCLUSION

This Court held, in ***Firestone***, that a trial court abuses its discretion by granting remittitur (or additur) where there is evidence in the record to support the jury's verdict. In that both ***Firestone*** and ***Dodd*** are direct corollaries to this case, this Court should adhere to its well-reasoned precedent and hold that an additur order must be viewed in the light most favorable to the jury's verdict, and that such an order is an abuse of discretion if, when looked at in such light, the jury's verdict is supported by the evidence introduced at trial. Further, such statement is mandated by Art. 1, §22(c), of the Missouri Constitution, which guarantees that the right to a jury trial will be preserved inviolate. When the Court applies this standard in this case, it will find that the evidence supported the jury's verdict, so that the trial court abused its discretion in ordering additur. As an additional reason that additur does not apply here, there are no grounds for additur when the jury verdict conformed to the instructions given, as they did here.

Alternatively, § 537.068 R.S.Mo. is unconstitutional as violating the right to jury trial, as guaranteed by Art. I, §22(a), of the Missouri Constitution. As this Court has very recently noted, "Article I, section 22(a) is one of the fundamental guarantees of the Missouri Constitution, providing 'the right of trial by jury as heretofore enjoyed shall remain inviolate.'" ***Watts v. Lester E. Cox Medical Centers, et al.***, 376 S.W.3d 633, 637 (Mo.banc 2012). By allowing a trial judge to set aside the jury's determination as to the amount of damages and order an increased damage award, both §537.068 R.S.Mo. and Mo.S.Ct. Rule 78.10 invade the province of the jury, and deny a litigant his rights under Art. 1, §22(a). According to this Court in ***Watts,*** there are two steps involved in analyzing

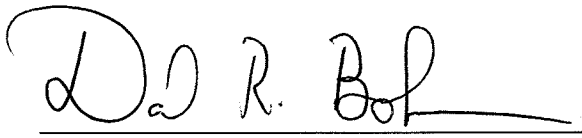
whether a statute violates Art. I, §22(a). First, the Court analyzes whether the cause of action affected is included within "the right to trial by jury as heretofore enjoyed." ***Id.*** at 637-38. This Court has already answered this question "yes" in ***State ex rel. Diehl v. O'Malley***, 95 S.W.3d 82 (Mo. banc 2003), in which it held there was a right to a jury trial in an action filed under the Missouri Human Rights Act. The second step in the analysis is "to determine whether the right to trial by jury 'remain[s] inviolate'" when a court order applies the statute or practice in question. ***Watts*** at 638. In that this practice did not exist at common law in Missouri in 1820, when the State's first constitution, with a provision identical to present day Art. 1, §22(a), was adopted, both the statute and rule, to the extent that they permit additur, violate Art. I, §22(a), of the Missouri Constitution.

For either of these alternative reasons, this Court should reverse the trial court's decision and remand to the trial court with an order to enter judgment in accordance with the jury verdict.

In the event that this Court finds §537.068 constitutional, and finds that the trial court did not abuse its discretion by granting additur, it should nonetheless reverse the trial court's order to the extent that it ordered a new trial as to damages only, and it should have ordered a new trial as to all issues. First, to the extent that Mo.S.Ct. Rule 78.10 would permit the trial court to order a new trial as to damages only, it unconstitutionally invades the province of the jury. Second, it was an abuse of discretion for the trial court to order trial only as to damages, given the intertwined nature of the issues of liability and damages in this case, and the – at best – weak evidence of liability.

Respectfully Submitted

DANNA MCKITRICK, P.C.

BY: 

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that I caused true and correct copies of the foregoing document to be served upon the Attorneys for Respondent receiving notice through the Court's electronic filing system by filing electronically with the Court at the date and time filed.

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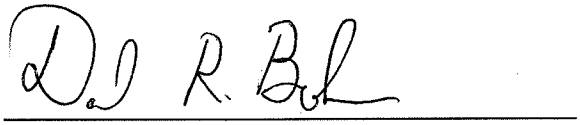

CERTIFICATE OF COMPLIANCE

By submitting this Substitute Brief, the undersigned counsel for Appellants hereby certifies the following:

1. This brief conforms to Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) and;
3. The number of words used in this brief is 13,295;

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